88-1331

Supreme Court, U.S.
FILED
FEB 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RANDY ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

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(1a) QUESTIONS PRESENTED

1. Whether the confrontation clause of the Sixth Amendment (as embodied in Fourteenth Amendment due process of law) is violated when defendant is prevented from demonstrating the extent of benefit a State witness receives, i.e., that his plea agreement involves his receiving probation instead of a mandatory minimum prison term of six years.

2. Whether a State rule that prohibits a jury from knowing what sentence a defendant faces can be applied by the trial court at the prosecution's request to unduly limit defendant's right of confrontation by preventing defendant from having the jury advised that the co-defendant witness, who is receiving probation as part of a plea agreement, is

thereby avoiding a mandatory six year prison sentence.

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Randy Roy, was the defendant in the Circuit Court of Woodford County, Illinois, appellant in the Appellate Court of Illinois, and petitioner in Petition for Leave to Appeal filed in the Supreme Court of Illinois. Respondent, People of the State of Illinois, was plaintiff in the Circuit Court of Woodford County, Illinois, appellee in the Appellate Court of Illinois, and respondent in the Supreme Court of Illinois.

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(1d) Opinion Below

The Illinois Appellate Court's Opinion in this cause is People v. Roy, ___ Ill.App. 3d ___, 526 N.E.2d 204, 122 Ill.Dec. 64 (1988).

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No.

RANDY ROY,

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH JUDICIAL DISTRICT

Petitioner, Randy Roy (hereafter, defendant), prays that a writ of certiorari issue to review the Illinois Appellate Court for the Fourth District, affirming his conviction and sentence for delivery of in excess of 30 grams of

controlled substance and calculated drug conspiracy for delivery of more than 30 grams and obtaining more than $500.00 from the conspiracy, in violation of Ill. Rev. Stat. 1985, Ch. 56 1/2, Sec. 1405, leave to appeal having been denied by the Illinois Supreme Court.

Judgment, Opinion and Order Below

The Opinion of the Appellate Court of Illinois, Fourth Judicial District, affirming the trial court judgment, is set out as Appendix A. The Order of the Appellate Court of Illinois, Fourth Judicial District, denying Petition for Rehearing, is set out as Appendix B. The Order of the Illinois Supreme Court denying Petition for Leave to Appeal, is set out as Appendix C.

Jurisdictional Statement

On July 14, 1988, the Illinois Appellate Court, Fourth Judicial District, filed its Opinion affirming the judgment of the Circuit Court of Woodford County, Illinois. (App. A) A Petition for Rehearing, timely filed, was denied on August 10, 1988. (App. B) Defendant's Petition for Leave to Appeal, timely filed, was denied by the Illinois Supreme Court on December 8, 1988. (App. C) This Petition is timely filed within 60 days thereafter. Jurisdiction is invoked under 28 U.S.C. 1257(3) and Rules 20.1 and 29 of this Court.

Constitutional Provisions

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....

AMENDMENT [XIV]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall ... deprive any person of ... liberty, without due process of law....

STATEMENT OF THE CASE

Nature of the Case

Petitioner, Randy Roy, was found guilty of delivery of in excess of 30 grams of controlled substance, and calculated drug conspiracy for delivery of more than 30 grams and obtaining more than $500.00 from the conspiracy, and sentenced to the Illinois Department of Corrections for a period of 8 years.

STATEMENT OF FACTS

On September 3, 1986, Mark Johnson was arrested with a half ounce of cocaine. He was charged with delivery of cocaine in excess of 30 grams and calculated criminal drug conspiracy to deliver in excess of 30 grams of cocaine. (Tr. 31) These offenses require a mandatory minimum period of imprisonment of six years. Ill. Rev. Stat., Ch. 56 1/2, Secs. 1401(a), 1405(a), Ch. 38, Sec. 1005-8-1(3).

Mr. Johnson negotiated a plea agreement with the State which provided that in exchange for his testimony incriminating the defendant, he would receive four years probation, the first ninety days in the Paxton County Jail, forfeit $13,000.00 in cash and pay a fine of $3,000.00. (Tr. 39-40) He testified

that he knew Randy Roy (Tr. 16) through an introduction made by one Bill Anderson (Tr. 17), and that he asked Anderson if he, Johnson, could start dealing drugs (Tr. 17-18) by buying them from Anderson and Randy Roy. (Tr. 18) He testified that he purchased drugs from Randy Roy, with deliveries being made after the initial arrangement with Roy through Bobby Moore, an associate of Roy's.

He admitted that at the time he testified before the grand jury, he had made arrangements to plead guilty only to a Class 1 felony, and that other charges would be dismissed. (Tr. 39) He knew that the calculated criminal conspiracy charge would be dismissed. (Tr. 40)

The trial court precluded any examination of Johnson concerning that he had faced a mandatory minimum of six

years. (Tr. 40-41) The limitation was imposed because this would also advise the jury that defendant, similarly charged, faced a mandatory minimum of six years. (Tr. 40-41)

No evidence--either testimony or corroborating physical evidence--other than the accusation of Johnson supported the charges against Roy.

Gary King, a narcotics agent with the State of Illinois, never heard the name of Randy Roy during the course of his investigation. (Tr. 96)

Kenneth E. Wurl, Jr., a narcotics investigator for the Illinois State Police (Tr. 109), questioned Mark Johnson after his arrest. Johnson told Wurl he received his drugs from a Bob Moore. (Tr. 112) A phone book confiscated from Johnson and a search of Johnson's safe

deposit box contained no reference to Randy Roy.

Wurl participated in the arrest of Randy Roy in Indianapolis. (Tr. 115) No drugs were found at the time of the arrest (Tr. 115), no large amounts of cash (Tr. 115), no drug paraphernalia. (Tr. 115) Wurl was not aware of any drugs being found at Mr. Roy's home or place of business. (Tr. 116)

Michael T. Raleigh, a marketing representative for community hospitals in Indianapolis (Tr. Vol. VI, 4) testified that Randy Roy's reputation in the community is that of a law-abiding citizen of fine moral character, especially among business leaders and members of the Chamber of Commerce.

Lee Bell, a commercial real estate broker, testified to the same effect. (Tr. Vol. VI, 6)

Defendant was sentenced to eight years in the Illinois Department of Corrections.

RAISING THE FEDERAL QUESTION

Defendant's right of confrontation under the Sixth Amendment was raised in the trial court when cross-examination was limited (Tr. 41-42); in the motion for new trial, where the limitation was raised as a violation of defendant's right of confrontation; in the Brief filed in the Illinois Appellate Court, where defendant asserted: "Defendant's constitutional right of confrontation was denied through limitation of cross-examination as to the benefits Johnson

was receiving by testifying for the State," and this contention was considered by the State Appellate Court. The Illinois Appellate Court recognized that the right to cross-examination of a witness regarding possible bias or motive is guaranteed by the Federal and State Constitutions (App. A, p. 20), but held the limitation here imposed by the trial court was proper, because "trial court's limitation of cross-examination of an accomplice was proper to prevent disclosure of the potential sentence facing the defendant." (App. A, p. 22) Although the State Appellate Court did not expressly mention the United States Constitution, the cases cited to it and the cases it discussed demonstrate the involvement of constitutional basis.

Hence, the constitutional issue was raised. See Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, n.3, 475 U.S. at 677, n.3 (1986). That the State Court's application of its rule improperly violated defendant's constitutional rights and was contrary to the prevailing law in the United States upon defendant's right of confrontation, was raised in a Petition for Leave to Appeal to the Illinois Supreme Court. That Court denied review by order and without opinion. (App. C)

REASONS FOR GRANTING CERTIORARI

1.

Defendant's Sixth Amendment constitutional right of confrontation (as embodied in Fourteenth Amendment due process of law) was violated when defendant was prevented from demonstrating the extent of benefit being received by a co-defendant State witness--i.e., that the witness would receive probation and nine months incarceration, where, if he did not cooperate, he was facing a mandatory minimum prison term of six years.

SUMMARY OF ARGUMENT

Defendant's due process right of confrontation includes the right to demonstrate the extent of benefit an alleged accomplice is receiving for his testimony against defendant. A State rule that prohibits defendant from demonstrating that the accomplice, who is receiving probation and nine months incarceration in exchange for testifying for the prosecution, is avoiding a

mandatory minimum six year prison sentence because to so advise the jury would also advise them of the sentence defendant could receive, violates defendant's right of confrontation and is contrary to the prevailing view of the majority of courts in the United States which have considered this question. (See, e.g., Powe v. Florida, Dist. Ct. App. of Fla., 413 So.2d 1273 (1982); State v. Morales, 120 Ariz. 517, 587 P.2d 236 (1978); Jarrett v. State of Indiana, 498 N.E.2d 967 (1986).)[1]

* * *

The State's entire case depended on the credibility of Johnson. No evidence other than Johnson's testimony connected

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1. For additional cases, see pp. 16-17, infra.

defendant to the offense. (See Statement of Facts, pp. 7-8, supra.)

Defendant's right of confrontation was violated when the trial court ruled that defense counsel could not demonstrate that by cooperating, Johnson was avoiding a mandatory minimum six year prison sentence. The court prevented cross-examination on this issue because to pursue such inquiry would also advise the jury that defendant, who was similarly charged, also faced such a mandatory minimum if convicted. (Tr. 40-41)[2] The Appellate Court held that where the defendant and the State witness are

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2. If defendant and State witness are not charged with the same offense, defendant could demonstrate the mandatory minimum that the State witness is avoiding.

charged with the same offense, in order to prevent the jury learning the mandatory minimum the defendant faces, the prosecution can prevent the jury from knowing the extent of the benefit being received by the State witness. (App. A, pp. 21-22)

This application of such rule violates defendant's right of confrontation, and is contrary to the prevalent view throughout the United States. Powe v. Florida, Dist. Ct. App. of Fla., 413 So.2d 1273 (1982); State v. Morales, 120 Ariz. 517, 587 P.2d 236 (1978); State v. Melendez, 121 Ariz. 1, 588 P.Rptr.2d 294 (1978); Kembro v. Florida, 346 S.2d 1083 (1977); People v. Tyler, 387 N.Y.S.2d 478 (1976); State of Washington v. Brooks, 25 Wash. App. 550, 611 P.2d 1274 (1980); State of Iowa v. Donelson, 302 N.W.2d 125

(1981); Jarrett v. State of Indiana, 498 N.E.2d 967 (1986).

As stated in Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986), confrontation involves the right to "expose a witness' motivation in testifying." (475 U.S. 678-79) While a judge may limit inquiry, Van Arsdall, a limitation that "keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony" (Gordon v. United States, 344 U.S. 414, 97 L.Ed. 447, 73 S.Ct. 369 (1953) at 344 U.S. 423), violates defendant's right of confrontation. Cf. Delaware v. Fensterer, 474 U.S. 15, 88 L.Ed.2d 15 (1985). State reviewing courts other than Illinois have held that knowing the mandatory minimum that a witness is avoiding is a fact the jury must know in

order to evaluate the benefit received for assisting the State; and preventing such inquiry is a denial of defendant's right of confrontation.

In State v. Morales, supra, the Arizona Supreme Court, sitting in banc, reversed, stating:

> "It appears from the record that the trial court's reason for precluding evidence of the penalty the witness could have received was to prevent the jury from learning of the penalty the defendants in this case might receive if convicted of first degree murder. Whatever merit this reason may have, it cannot outweigh the right of the defendant to cross-examine the State's major witness on what he expects in return for his testimony."[3]

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3. See also State v. Melendez, 121 Ariz. 1, 588 P.Rptr.2d 294 (1978); Kembro v. Florida, 346 S.2d 1083 (1977).

In Jarrett v. State of Indiana, supra, the Indiana Supreme Court specifically held that although sentencing information may not be relevant to a jury's determination in the criminal case, there is no substantial risk of prejudice to the State for the jury to be advised of the mandatory minimum sentence the witness was avoiding by cooperating with the State. The Court held it was error to exclude such evidence, even when the witnesses testified that they themselves were unsure of the mandatory penalty.

In Powe v. Florida, supra, the State witness had pled guilty to the offense of possession of cocaine in return for the State dropping the charge of trafficking in methaqualone, for which there was a mandatory minimum of five years. The trial court sustained the prosecution's

objection to defense counsel's question of whether the witness knew of the minimum mandatory penalty for a conviction of trafficking. The Florida Appellate Court reversed, holding that sustaining the objection was error, because:

> "... [w]hether Michel knew of the minimum mandatory penalty for a conviction of trafficking in methaqualone may have impacted significantly on the plea-bargaining agreement on Michel's willingness to testify against Powe [the defendant] .... Ho Yin Wong v. State, 359 So.2d 460 (Fla. 3d DCA 1978). Here, the trial court clearly abused its discretion by unduly limiting the defense interrogation of Michel."

In People v. Tyler, supra, the trial court precluded defendant from attempting to show that "the crucial prosecution witness' motive to lie" was increased because the witness, an indicted co-defendant, faced a very severe sentence

prior to his agreement to testify in return for no jail time. The basis of the trial court exclusion was that it would reveal to the jury the sentence defendant faced. The New York Appellate Division held that:

> "The vital theory of the witnesses' veracity through cross-examination on this point was impermissibly abridged. Under the circumstances herein, the prosecutor and not the defendant, must bear the burden that the jury would know that defendant faced the same sentence (cf. Davis v. Alaska, 415 U.S. 308, 320, 94 S.Ct. 1105, 39 L.Ed.2d 347)."

Similarly, in State of Washington v. Brooks, supra, the Washington Appellate Court held that when an accomplice testifies for reduced charge, it is reversible error to exclude cross-examination intended to demonstrate that if he had not cooperated and pled to the reduced charge, he faced a mandatory five

year minimum sentence. Again, in State of Iowa v. Donelson, supra, the court held it was reversible error for the jury not to be advised of the fact that the accomplice, by testifying for the State against the defendant, was avoiding a mandatory minimum sentence.

The purpose of permitting cross-examination on interest and bias is to assure that the jury has before it sufficient facts to assess the credibility of the witness. As demonstrated by the appellate opinions from States other than Illinois, as discussed above, unless the jury knows what minimum is being avoided, the jury does not have those essential facts bearing on the co-defendant's

credibility, and defendant's right of confrontation is denied.[4]

The ostensible reason for precluding inquiry as to the co-defendant's knowledge of the mandatory minimum prison term he is avoiding by his "deal," is to enforce a State rule preventing the jury from learning the sentence faced by the similarly-charged defendant. However, this Court already has held that when a State rule conflicts with the right of cross-examination as to a witness's possible bias, such rule must give way to the paramount right of confrontation/cross-examination. Davis

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4. Here, where there was no evidence against defendant other than that of the witness, limiting cross-examination as to the extent of the benefit is not harmless. Delaware v. Van Arsdall, supra.

v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347 (1974) (confidentiality of juvenile court records per State law could not preclude defendant's exercise of right of confrontation of juvenile witness). Indeed, the instant State decision violates the principles laid down in Davis.

Certiorari should be allowed to permit this Court to scrutinize the improper limitation of confrontation and cross-examination of a co-defendant witness which the Illinois courts have imposed as a consequence of a State rule barring the jury from learning of defendant's possible sentence. That this issue

arises with great frequency[5] in the criminal justice system throughout the States is evident from the number of State reviewing courts that have considered the issue (see p. 17, supra) and from the fact that the federal government and each of the fifty States has at least one offense that has a mandatory minimum sentence.[6] Illinois stands alone in precluding defendant from cross-examining a co-defendant witness on the vital issue as to the extent of the benefit he is receiving in exchange for

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5. In Perry v. Leeke, ___ U.S. ___, No. 87-6325, Dec. 1/11/89, 44 CrL 3053, the court stated:

> "Because the question presented by this case is not only important, but also one that frequently arises, we granted certiorari."

6. See Appendix D.

his testimony against defendant. The judgment sought to be reviewed conflicts with the decisions of the many States whose reviewing courts have considered the question.

This cause is an appropriate vehicle for this Court to express that the majority of the State decisions represent the constitutionally required view, and that Illinois has violated defendant's rights to due process and confrontation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

And, on the merits, defendant's convictions should be reversed, because he was deprived of his essential due process right of confrontation.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

4-87-0384
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from
	)	Circuit Court
Plaintiff-Appellee,	)	County of Ford
	)	No. 86CF46
vs.	)	
	)	Honorable
RANDY ROY	)	W. Mark Dalton,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the opinion of the court:

On October 7, 1986, the defendant, Randy Roy, was indicted by the grand jury of Ford County on charges of unlawful delivery of a controlled substance (30 grams cocaine) (Ill. Rev. Stat. 1985, ch. 56 1/2, par. 1401(a)(2)), calculated criminal drug conspiracy (Ill. Rev. Stat. 1985, ch. 56 1/2, par. 1405), and calculated criminal cannabis conspiracy (Ill. Rev. Stat. 1985, ch. 56 1/2, par 709(a)). Following jury trial, the

defendant was convicted of unlawful delivery of a controlled substance (30 grams cocaine) and calculated criminal drug conspiracy. He was subsequently sentenced to a term of eight years' imprisonment and a fine of $22,500.

The defendant appeals asserting: (1) the evidence was insufficient to sustain his convictions; (2) he was denied the constitutional right to confront the witnesses against him; and (3) the verdict forms, which failed to specify the weight of the drugs involved, were inadequate.

At trial, the State presented Mark Johnson, a Paxton resident and admitted drug dealer. Johnson was arrested on September 3, 1986, and subsequently charged with delivery of cocaine in excess of 30 grams and calculated

criminal drug conspiracy. Johnson admitted he was testifying pursuant to an agreement with the State whereby certain charges pending against him were to be dismissed in exchange for his testimony.

Johnson stated that he used drugs, specifically marijuana and cocaine. He stated that he purchased his drugs from the defendant who he met in June of 1985. Johnson was introduced to the defendant by a friend of his, Bill Anderson. Johnson then asked the defendant if he could start dealing drugs and the defendant agreed. Johnson explained that the defendant fronted the drugs and he would pay the defendant after he had sold them. Usually the drugs were delivered to Johnson by a runner employed by the defendant. This

runner was identified by Johnson as Bob Moore.

Johnson reiterated all his past dealings with the defendant. Johnson estimated that he had made in excess of $100,000 in drug sales over a one-year period. Johnson sold both marijuana and cocaine. Johnson usually paid $750 to $850 per pound for marijuana and $1,800 to $1,900 per ounce for cocaine.

On August 15, 1986, Johnson contacted the defendant regarding the delivery of some cocaine. Shortly thereafter he received approximately 4 ounces of cocaine. He estimated the value of the drugs at $7,000. As in the past, Johnson did not pay for the drugs upon receipt. The drugs were delivered to his residence in Paxton by Bob Moore. Johnson

additionally stated that in the late spring of 1986 he received 80 to 90 pounds of marijuana from the defendant. The marijuana was delivered in 10-pound lots.

Johnson explained that he would then distribute the marijuana to other individuals, specifically Dave Kemmitzer and Randy Hobbs. Johnson explained that he generally sold the marijuana in pound lots. Upon receipt of a new shipment, Johnson would reimburse the defendant for the previous delivery.

On the date of his arrest, September 3, 1986, Johnson was in Randy Hobbs' trailer when there was a police raid. Johnson stated that he was in possession of $9,000 cash and a half ounce of cocaine. Johnson stated that this

cocaine was purchased from the defendant.

Subsequent to his arrest, Johnson's home was searched by the police. During the search, the officers confiscated a black notebook containing names, addresses, and dollar amounts. Johnson testified that this book contained names of people he sold drugs to as well as people who owed him money. Johnson admitted that neither Randy Roy nor Bob Moore were listed in the book. Johnson claimed, however, that the book was mainly a listing of debts and not drug-related transactions.

On cross-examination, Johnson explained the specifics of his plea agreement with the State in return for his testimony. Johnson stated the charge of calculated criminal conspiracy was to

be dismissed. Johnson would plead to the remaining charge. Johnson was offered 4 years' probation, 90 days in the Paxton County Jail, $13,000 forfeiture of cash, and a $3,000 fine as a sentence. Johnson further stated that on October 7, 1986, he testified before the grand jury regarding the defendant's involvement in the drug trade in Paxton. At that time, Johnson named a number of individuals to whom he had sold drugs in the past. He admitted at trial that he did not name the same individuals as purchasers during his direct testimony.

The State next presented five witnesses including Todd Hofer, Brian Breymeyer, Richard Ingold, William Cofel, and Alexander Michael Dorshe. Each of these individuals testified they used

illegal drugs and that they purchased either marijuana or cocaine from Mark Johnson. None of the individuals, however, knew of Randy Roy or Bob Moore.

Gary King, special agent with the Illinois Division of Criminal Investigation, Narcotics Division, testified that he made controlled buys of narcotics from Randy Hobbs, a Paxton resident. On August 22, 1986, King met Hobbs at his trailer and arranged for the purchase of a quarter ounce of cocaine. On that date, Hobbs indicated he would have to go to Champaign to obtain the drugs. Hobbs told King he would meet with him the next day. King returned the next day and purchased a quarter ounce of cocaine for $620. Laboratory results from the analysis of the drugs purchased

revealed 6.7 grams of cocaine. On cross-examination, King admitted that during the purchase from Hobbs, the names of Randy Roy and Bob Moore were not mentioned.

Randy Hobbs, a Paxton resident, recently convicted of selling cocaine, testified that he purchased all of his drugs from Mark Johnson. Hobbs stated that the cocaine sold to Gary King on August 22, 1986, was purchased from Mark Johnson. On cross-examination, Hobbs claimed that he did not know Randy Roy or Bob Moore.

The State finally presented Kenneth Wurl, of the Illinois State Police, Narcotics Division. Wurl stated he assisted in the execution of a search warrant at Hobbs' trailer in Paxton on

September 3, 1986. This was the date on which Mark Johnson was arrested for possession of cocaine. The cocaine recovered from Johnson was subsequently sent to the State crime lab for analysis. Test results revealed the presence of approximately 16 grams of cocaine. Wurl stated that a deal was made with Hobbs whereby Hobbs was to produce cocaine and an undercover agent in return was to deliver a certain amount of marijuana. The amount of money involved exceeded $20,000. On September 4, 1986, Wurl interviewed Johnson at Illinois State Police headquarters. At this time, Johnson indicated that he received the drugs from Bob Moore.

The defense presented two character witnesses. Michael Raleigh and Lee Bell

both testified that the defendant was a moral and upright individual with a good reputation in the community.

Following deliberations, the jury returned verdicts of guilty on all three counts, unlawful delivery of a controlled substance, calculated criminal drug conspiracy, and calculated criminal cannabis conspiracy. Following a hearing on defendant's post-trial motion, the court vacated the conviction for calculated criminal cannabis conspiracy. The defendant was subsequently sentenced to a term of eight years' imprisonment and a fine of $22,500.

The defendant initially challenges the sufficiency of the evidence. Defendant claims the uncorroborated testimony of an

accomplice who testifies pursuant to a deal with the State's Attorney, standing alone, cannot support a conviction.

The standard of review of criminal convictions is well established. A conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. People v. Byron (1987), 116 Ill.2d 81, 89-90, 506 N.E.2d 1247, 1250, quoting People v. Collins (1985), 106 Ill.2d 237, 261, 478 N.E.2d 267, 276.

In Collins, the Illinois Supreme Court adopted the standard as enunciated in Jackson v. Virginia (1979), 443 U.S. 307, 319, 61 L.Ed.2d 560, 573, 99 S.Ct. 2781, 2789, quoting:

> "'[T]he relevant question is whether, after viewing the

> evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Collins, 106 Ill.2d at 261, 478 N.E.2d at 277.)

The court went on to note:

> "'[o]nce a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.' (Emphasis in original.) 443 U.S. 307, 319, 61 L.Ed.2d 560, 573, 99 S.Ct. 2781, 2789." Collins, 106 Ill.2d at 261, 478 N.E.2d at 277.

The uncorroborated testimony of an accomplice can be sufficient to sustain a conviction where the jury is convinced beyond a reasonable doubt. (Byron, 116 Ill.2d 81, 506 N.E.2d 1247; Collins, 106 Ill.2d 237, 478 N.E.2d 267.) The problems inherent in accomplice testimony

are well recognized. An accomplice may have been promised leniency or harbor ill will toward the accused. (People v. Newell (1984), 103 Ill.2d 465, 469 N.E.2d 1375.) Consequently, such testimony should be accepted with the utmost caution and subjected to the highest scrutiny. Ultimately, however, the determination of whether such testimony forms a sufficient basis for conviction is one for the jury which is entrusted with the task of assessing the credibility of the witnesses and the weight afforded their testimony. Byron, 116 Ill.2d at 90, 506 N.E.2d at 1250, quoting Collins, 106 Ill.2d at 261-62, 478 N.E.2d at 277.

Contrary to the defendant's assertions, the fact that an accomplice

has been promised leniency in return for testimony does not automatically raise a reasonable doubt as to the defendant's guilt. (People v. Sangster (1981), 95 Ill.App.3d 357, 420 N.E.2d 181, aff'd in relevant part and rev'd in part (1982), 91 Ill.2d 260, 437 N.E.2d 625.) Likewise, the introduction of good character evidence by the defendant does not in itself create a reasonable doubt. (People v. Lopez (1984), 129 Ill.App.3d 488, 472 N.E.2d 867.) Although these types of evidence may raise a reasonable doubt regarding the defendant's guilt, it is within the province of the trier of fact to make that determination. Lopez, 129 Ill.App.3d 488, 472 N.E.2d 867.

In reviewing a sufficiency question we will neither reweigh the evidence nor judge the credibility of the witnesses. The evidence herein indicated that Johnson had been involved in a series of ongoing drug transactions with the defendant for a period dating back to the summer of 1985. The jury was made well aware of Johnson's involvement in the drug trade in the Paxton area as well as his pending charges and plea arrangement with the State's Attorney's office. The jury was informed of the infirmities of Johnson's testimony and was specifically instructed that Johnson's testimony was to be viewed with suspicion. The jury, however, chose to believe the testimony of Johnson over the evidence presented by the defendant. In viewing all the

evidence presented in a light most favorable to the prosecution, we cannot say that the defendant's convictions were unsupported.

The defendant next contends that the trial court unduly restricted his right to cross-examine the State's main witness, Mark Johnson. During cross-examination, the following colloquy ensued:

> "Q. [PROSECUTOR]: Now, on October 7, do you recall this question being asked: 'As a result of your talking with the agents, has it been agreed that although you will be indicted on three counts, you will be asked to plea to just to one count, Class I felony, and the other two charges will be dismissed?'
>
> A. [MARK JOHNSON]: Correct.
>
> Q. You had a deal worked out, didn't you?
>
> A. Correct.

Q. Still have a deal worked, don't you?

A. Yes.

Q. When you're done testifying, you'll be able to take your plea and that will take care of the case, right?

A. Hopefully.

Q. You're going to get probation, aren't you?

A. I don't know.

Q. Have you been offered 4 years' probation, 90 days in the Paxton County Jail, forfeit $13,000 cash and a fine of $3000?

A. I haven't talked to my lawyer since the letter was sent to him.

Q. But you know there's going to be a deal?

A. Yes.

Q. In exchange for that deal, its to testify?

A. Correct.

Q. Now, one of the cases--one of the charges that is going to be dismissed is calculated criminal conspiracy, isn't it? Both of those, they're going to be dismissed, right?

A. Yes.

Q. That's part of your deal. Now, you like that deal because you're aware that that's got a mandatory prison sentence, right?

A. No, I'm not aware of that.

Q. Doesn't surprise you, does it? Your lawyer hasn't told you that?"

At this point, the State's Attorney objected to questioning regarding a mandatory jail sentence. Counsel argued it would be improper to reveal the sentence for calculated criminal conspiracy because it was a charge facing the defendant. The court sustained the State's objection and disallowed any further reference to a mandatory prison

sentence. The defendant maintains that the failure to allow evidence of the mandatory minimum jail sentence facing the accomplice constitutes reversible error.

The right to cross-examination of a witness regarding possible bias or motive is guaranteed by the Federal and State constitutions. (People v. Gonzalez (1984), 104 Ill.2d 332, 472 N.E.2d 417.) While a defendant should be given the widest possible latitude in cross-examining a State's witness, the form that latitude takes rests in the sound discretion of the trial court. (See Gonzalez, 104 Ill.2d 332, 472 N.E.2d 417; People v. Young (1983), 118 Ill.App.3d 803, 455 N.E.2d 845.) Any decision by the trial court regarding limitation of

cross-examination will not be overturned upon review absent a showing of a clear abuse of discretion resulting in a manifest prejudice. Young, 118 Ill.App.3d 803, 455 N.E.2d 1368.

Here, the witness was asked on cross-examination whether the charges of calculated criminal conspiracy were to be dismissed as part of the plea agreement and whether those charged carried a mandatory prison sentence. The questioning concerned the same charges made against the defendant.

Contrary to the defendant's assertion, we find this issue controlled by our previous disposition in People v. Lake (1978), 61 Ill.App.3d 428, 378 N.E.2d 364, which was reaffirmed in People v. Gibson (1983), 117 Ill.App.3d 270, 452

N.E.2d 1368. In Lake, an accomplice testified on behalf of the prosecution. The accomplice explained that in return for his testimony, the State had agreed to reduce his burglary charge to a theft under $150 charge. During cross-examination, defense counsel attempted to inquire about the sentencing differences between burglary and theft under $150. (Lake, 61 Ill.App.3d at 431, 378 N.E.2d at 366.) The court, however, precluded any inquiry regarding specific sentences. We determined that the trial court's limitation of cross-examination of an accomplice was proper to prevent disclosure of the potential sentence facing the defendant. Lake, 61 Ill.App.3d at 431, 378 N.E.2d at 367; see also People v. Portis (1986), 147

Ill.App.3d 917, 498 N.E.2d 675) (adopting the Lake concept that evidence of a specific penalty is immaterial and irrelevant to the jury's fact-finding and may be restricted during cross-examination).

As in Lake, the defense counsel herein conducted an extensive inquiry into the nature of Johnson's plea arrangement with the State's Attorney. The specifics of the deal, including the dismissal of pending charges and the sentence offered were acknowledged by Johnson on cross-examination. Only when counsel sought to introduce evidence of a specific sentence of the dismissed count was the State's objection sustained. The express rationale underlying the preclusion of such evidence was to prevent disclosure

of the possible sentence facing the defendant who had been similarly charged.

As we noted in Lake:

> "The jury is the trier of fact and has no duty, authority or responsibility as to the sentences which may, or may not, be imposed. That is within the purview of the presiding judge solely. Not only is a possible penalty immaterial and irrelevant to the jury, but any reference to possible sentence may well prejudice the State's right to a fair trial--a right that is equally important to a defendant's right, and a right that is often forgotten or neglected." (Lake, 61 Ill.App.3d at 431, 378 N.E.2d at 367.)

Consequently, we find that in light of the substantial amount of evidence presented regarding Johnson's plea agreement and the wide latitude afforded the defense during cross-examination, the court was well within its discretion and the restraints imposed were reasonable.

Finally, the defendant claims the verdict forms were insufficient to justify his convictions where they failed to specify the weight of the drugs involved. Since the quantity of the drugs involved is an essential element of the offenses charged, the defendant maintains the absence of a specific finding of the requisite weight requires a reduction of his convictions to the lesser included offenses.

Alternatively, the defendant argues there was no evidence to support a finding of the requisite gram amount of drugs in support of his convictions. Our review of the evidence, however, indicates otherwise. There was testimony which indicated Johnson purchased four ounces of cocaine worth in excess of

$7,000 in August of 1986 which was part of "20 to 30 ounces" received by Johnson from the defendant. There also was testimony that an ounce of cocaine was 28 grams.

Initially, the State asserts that the defendant has failed to preserve this issue for review. It is well established that any error which is not raised at the trial court level is deemed waived. Where a defendant fails to object to jury instructions during the instruction conference or at trial and fails to offer an alternative instruction, he waives any objection thereto. (People v. Almo (1985), 108 Ill.2d 54, 483 N.E.2d 203.) In this case, the defendant did not object to the verdict forms tendered and did not offer any alternative verdict

forms. Consequently, the defendant has waived this issue.

On the merits, however, there is no dispute that the specific amount of an illegal drug allegedly possessed is an essential element going to the substance of the offense. (People v. Kadlec (1974), 21 Ill.App.3d 289, 313 N.E.2d 522.) As such, the gram amount constitutes an issue which must be specifically presented to the jury. (Kadlec, 21 Ill.App.3d 289, 313 N.E.2d 522.) Where, however, the jury instructions specifically inform the jury of the requisite gram amounts of contraband, the verdict forms need not reiterate that specific gram amount. (People v. Yettke (1981), 95 Ill.App.3d 365, 420 N.E.2d 194.) If the jury

instructions properly inform the jury of all the material elements of the offense charged, there is no error in submitting a general verdict form. Yettke, 95 Ill.App.3d 365, 420 N.E.2d 194.

The jury instructions given included the gram amounts of cocaine which were required to find the defendant guilty of delivery of cocaine in excess of 30 grams and calculated criminal drug conspiracy. Consequently, there was no error in submitting verdict forms which did not reiterate a requisite amount of cocaine to support a conviction.

Based on the foregoing, the judgment of the circuit court of Ford County is affirmed.

Affirmed.

GREEN, P.J., and SPITZ, concur.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

Clerk of the Court
(217) 782-2586

Research Director
(217) 782-3528

DATE: 08/10/88

RE: People v. Roy, Randy
General No.: 4-87-0884
Ford 86CF46

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368(b)) is filed in this court.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:mcb

TO: Frederick F. Cohn
Attorney at Law
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APPENDIX B

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ILLINOIS SUPREME COURT
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67631

December 8, 1988

Mr. Frederick F. Cohn
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No. 67631 - People State of Illinois, respondent, v. Randy Roy, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 30, 1988.

APPENDIX C

STATE	CODE PROVISION	OFFENSE
AK	Alaska Statutes § 1141.500 (1988)	Robbery in the first degree
AL	14 Ala. Code §§ 20-2-73 (1984)	Sale, furnishing, etc., of controlled substances by persons over 18 to persons under age 18
AZ	5 Ariz. Rev. St. Anno. § 13-1904 p. 833 (1978)	Armed robbery
AR	3 Ark. Code Anno. 5-64-401 (1987) Uniform Controlled Substance Act	Manufacture, deliver or possession with intent to manufacture or deliver a controlled substance
CA	40 Cal. Code § 11351 p. 366 (1975)	Possession for sale of designated controlled substances (i.e. heroin)
CO	8B Col. Rev. Stat. 18-18-105 p. 450 (1986)	Unlawful distribution, manufacturing, dispensing, sale of possession

STATE	CODE PROVISION	OFFENSE
CT	11BC.G.S.A. § 21a-278 p. 429 (1985)	Illegal manufacture, distribution, sale, precription or administration by non-drug dependent person
DE	9 Del. Code Anno. § 4753A p. 205 (1983)	Trafficking in marijuana, cocaine, illegal drugs or methamphetamine
FL	22 F.S.A. § 782.04 p. 154 (1976)	Murder
GA	14 Georgia Code Anno. 16-13-30 p. 755 (1988)	Possession, manufacture, distribution, etc. of controlled substance or marijuana
HI	12 H.R.S. S708-840 p. 208 (1985)	Robbery in the first degree
ID	4 Idaho Code 18-4004 p. 257 (1987)	Murder
IL	38 Ill. Stat. Anno. § 18-2 (1977)	Armed robbery
IN	8 Ind. St. 35-48-4-1 p. 505 (1985)	Dealing in a narcotic drug

STATE	CODE PROVISION	OFFENSE
IA	57 A I.C.A. § 707.2 p. 355 (1979)	Use of firearm (in a forcible felony)
KS	10 K.S.A. Crim. Code § 21-3427 (1971)	Aggravated robbery
KY	9A K.R.S. 218 A 990 p. 120 (1982)	Trafficking controlled substances
LA	9LSA.R.S. § 64.1 p. 603 (1986)	First degree robbery
ME	9A Maine Rev. Stats. Anno. § 651(1)(E) (1983)	Robbery
MD	3A Maryland Code Anno. § 286(b)(1) p. 291 (1988)	Unlawful manufacture, distribution, etc.; counterfeiting, manufacture, possession, etc. of certain equipment for illegal use; keeping common nuisance
MA	94c Anno. Laws of Mass. § 32F, p. 81 (1988)	Unauthorized manufacture, distribution, etc. of Class A substances to minors

STATE	CODE PROVISION	OFFENSE
MI	9c MSH § 14.15 (7401) p. 287 (1988)	Manufacture, delivery, possession, dispensing, prescription, administration prohibition
MN	40 M.S.A. § 609.11 Subd. 9, p. 98 (1987)	Minimum terms of imprisonment (applicable offenses)
MS	20 Miss. Code § 97-3-79 (1973)	Robbery - use of deadly weapon
MO	41 V.A.M.S. § 569.020 p. 5 (1979)	Robbery in the first degree
MT	7 Montana Code Anno. § 45-5-102 p. 35 (1987)	Deliberate homicide
NE	2 A Rev. Stat. of Neb. 328-416(1) p. 91 (1985)	Prohibited acts, violations (drugs and narcotics)
NV	12 N.R.S. § 453.333 p. 469 (1986)	Sale of controlled substance which causes death
NH	N.H. Rev. Stat. Anno. § 650 A-1 p. 186 (1986)	Felonious use of firearms

STATE	CODE PROVISION	OFFENSE
NJ	NJSA ZC:39-4a (1982)	Possession of weapons for unlawful purposes
NM	6 N.M.S. Anno. 31-18-16 (1978)	Use of firearm in commission of a non-capitol felony
NY	23B N.Y. Consolidated Laws Service Annotated Statutes § 220.43 (1984)	Criminal sale of a controlled substance in the first degree
NC	1B General Stat. of N.C. § 14-17 (1986)	Murder in the first degree
ND	2B N.D. Century Code Anno. § 12-1-16-01(1) (1985)	Murder
OH	Page's Ohio Rev. Code Anno. § 2925.03 (1987)	Trafficking in drugs
OK	63 O.S.A. § 2-401 (1984)	Dangerous substances offenses and penalties

STATE	CODE PROVISION	OFFENSE
OR	11 Oregon Rev. Stat. Anno. 161.610(4) (1987 Supp.)	Felonies/Use of firearms
PA	42 P.S. § 9712 (1982)	Offenses committed with firearms
RI	Gen. Rules of R.I. § 11-39-1 (1981)	Robbery and armed robbery
SC	Code of Laws of S.C. § 16-11-330 (1985)	Robbery and attempted robbery while armed with a dangerous weapon
SD	8ASDCL 22-14-12 (1988)	Commission of a felony while armed with firearm
TN	7 Tenn. Code Anno. 39-6-1710 (1982)	Use/possession of firearm in committing a felony
TX	1 V.T.C.A. Penal Code 16.01 (1974)	Unlawful use of crim. instrument
UT	8B U.C. Anno. 76-6-302 (1978)	Aggravated robbery
VT	13 V.S. Anno. § 608b (1974)	Assault and robbery

STATE	CODE PROVISION	OFFENSE
VA	Code of Virginia § 18.2-58 (1988)	Robbery
WA	9A R.C.W.A. 9A.56.200 (1988)	Robbery in the first degree
WV	W.V. Code § 61-2-12 (1984)	Robbery or attempted robbery
WI	W.S.A. 939.63(2) (1982)	Use of dangerous weapon
WY	W.S.A. § 6-2-401 (1988)	Robbery, aggravated robbery
Federal	21 USC 841a	Possession of controlled substance

FILED
APR 27 1989
JOSEPH F. SPANIOL, JR
CLERK

No. 88-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RANDY ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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(Printed by Authority of the State of Illinois (P.O. 34447—55—4-27-89)

QUESTION PRESENTED FOR REVIEW

Whether the refusal to allow cross-examination on one benefit received by a witness in exchange for his testimony violates the Confrontation Clause where substantial evidence of other benefits received was elicited, where the witness was unaware of the benefit about which cross-examination was prohibited and where permitting such cross-examination would have informed the jury of the sentence facing the defendant upon conviction.

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On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument contained herein, respondent does not believe petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE REFUSAL TO ALLOW CROSS-EXAMINATION ON ONE BENEFIT RECEIVED BY A WITNESS IN EXCHANGE FOR HIS TESTIMONY DOES NOT VIOLATE THE CONFRONTATION CLAUSE WHERE SUBSTANTIAL EVIDENCE OF OTHER BENEFITS RECEIVED WAS ELICITED, WHERE THE WITNESS WAS UNAWARE OF THE BENEFIT ABOUT WHICH CROSS-EXAMINATION WAS PROHIBITED AND WHERE PERMITTING SUCH CROSS-EXAMINATION WOULD HAVE INFORMED THE JURY OF THE SENTENCE FACING THE DEFENDANT UPON CONVICTION.

Petitioner alleges that his rights under the Confrontation Clause of the Sixth Amendment were violated when his cross-examination of the State's chief witness concerning that witness' plea agreement was restricted as to one aspect of the plea agreement. An examination of the proceedings at trial reveals that the limitation placed on the cross-examination did not violate petitioner's rights under the Confrontation Clause.

Petitioner was charged with three drug related offenses, including calculated criminal drug conspiracy. The chief witness against petitioner was Mark Johnson, one of petitioner's co-conspirators. Johnson had entered into a plea agreement with the State in exchange for his cooperation in this prosecution. During his cross-examination of Johnson, petitioner was permitted to show that Johnson had entered into the plea agreement and that pursuant to this plea agreement Johnson would be sentenced to 4 years probation, 90 days in the county jail, a $3,000.00 fine and would forfeit $13,000.00. Furthermore, petitioner was allowed to show that 2 of the 3 charges which had been

pending against Johnson had been dismissed and that one of these dismissed charges carried a mandatory prison sentence. *People v. Roy*, 172 Ill.App.3d 16, 526 N.E.2d 204 (4th Dist. 1988) (Appendix to Petition at pp. A-17 - A-19).

After petitioner's trial counsel began to cross-examine Johnson concerning the mandatory prison sentence for one of the dismissed charges the prosecutor objected to going further with this line of questioning and revealing the length of the mandatory sentence. This objection was sustained because one of the charges for which petitioner was being tried, calculated criminal drug conspiracy, was the same as the dismissed charge being referred to in the cross-examination of Johnson. To have permitted the further examination of Johnson on this question would have revealed to the jury the punishment petitioner would be subject to upon conviction. In affirming petitioner's conviction, the Appellate Court of Illinois noted the rationale for keeping such information from the jury by quoting language from an earlier opinion of that court:

> The jury is the trier of fact and has no duty, authority or responsibility as to the sentences which may, or may not, be imposed. That is within the purview of the presiding judge solely. Not only is a possible penalty immaterial and irrelevant to the jury, but any reference to possible sentence may well prejudice the State's right to a fair trial—a right that is equally important to a defendant's right, and a right that is often forgotten or neglected.

People v. Roy, supra, 526 N.E.2d at 209; Appendix to Pet. at A-24; *citing People v. Lake*, 61 Ill.App.3d 428, 378 N.E.2d 364 (4th Dist. 1978).

It was this single limitation imposed by the trial court upon the cross-examination of Johnson that forms the basis of petitioner's Confrontation Clause argument. This

Court has recognized the discretionary authority vested in trial courts with respect to limiting cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). A review of the proceedings below demonstrates that the limitation placed on the cross-examination of Johnson was a proper exercise of this discretionary authority. Moreover, while a number of approaches have been adopted concerning the problem posed when cross-examination will reveal the sentence facing the defendant if convicted, the approach utilized by the Illinois court below is neither out of the mainstream nor is it constitutionally impermissible.

In *United States v. Garrett*, 727 F.2d 1003 (11th Cir. 1984), cross-examination of one of the government's witnesses revealed numerous aspects of a plea agreement entered into by the witness in exchange for his testimony. This information included the minimum sentence for one of the dismissed charges. When defense counsel started to question the witness concerning the potential sentences for another dismissed charge, the government objected because the subject of this line of questioning was the same charge for which the defendant was being tried. In affirming the decision not to allow this line of questioning, the court noted "pursuit of the proposed line of questioning would have revealed to the jury the severity of the sentence to which [defendant], if convicted, would have been subjected. Because such information would have been extrinsic and prejudicial, the trial court was certainly justified in preventing defense counsel from eliciting it." 727 F.2d at 1012. Limiting cross-examination to prohibit the jury from discovering the potential penalties faced by a defendant has also been approved by the Supreme Court of Kansas (*State v. Davis*, 237 Kan. 155, 697 P.2d 1321

(1985)); the Supreme Judicial Court of Maine (*State v. Larrabee*, 377 A.2d 463 (1977)); the Court of Appeals of New York (*People v. DeVito*, 56 N.Y.2d 846, 438 N.E.2d 875 (1982)); and the Court of Appeals of Idaho (*State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (1984)). Some courts, however, have decided to err on the side of caution and allow the introduction of such evidence. *See, e.g. Jarrett v. State*, 498 N.E.2d 967 (Ind. Sup. Ct. 1986).

While it is clear that the numerous courts which have considered this question have resolved it in differing manners, this diversity of resolutions of this issue is not an indication that the issue need be addressed by this Court. This diversity is merely a reflection of the exercise of discretion. Respondent believes that the controlling questions here should not be whether all courts take the same approach to this question, but whether the issue was resolved in a constitutional manner in this case. Petitioner was allowed to confront and cross-examine Johnson. He was allowed to demonstrate that Johnson had entered into a plea agreement in exchange for his testimony. Petitioner was allowed to show that Johnson was not going to be sentenced to prison and petitioner succeeded in informing the jury that prior to the plea agreement Johnson faced a mandatory prison sentence. The jury was clearly shown that Johnson received a significant benefit from the State in exchange for his testimony, yet the jury chose to believe him. This the jury had the right to do.

There is another and perhaps even more compelling reason to deny this petition. As noted by the appellate court when reviewing petitioner's conviction, the following exchange took place during the cross-examination of Johnson:

Q. Now, one of the cases—one of the charges that is going to be dismissed is calculated criminal conspiracy, isn't it? Both of those, they're going to be dismissed, right?

A. Yes.

Q. That's part of your deal. Now, you like that deal because you're aware that that's got a mandatory prison sentence, right?

A. No, I'm not aware of that.

Q. Doesn't surprise you, does it? Your lawyer hasn't told you that?

At this point, the State's Attorney objected to questioning regarding a mandatory jail sentence.

People v. Roy, 526 N.E.2d at 208; Appendix to Pet. at A-19.

It is, therefore, clear that Johnson was not even aware of the mandatory minimum sentence associated with the dismissed charge. When reviewing a similar situation, the court in *United States v. Del Toro Soto*, 676 F.2d 13 (1st Cir. 1982), noted "it was the witness' understanding of the plea bargain, not the statutory penalty on the dismissed counts, that bore on his credibility." 676 F.2d at 19. Where, as here, the witness is unaware of the mandatory prison sentence on the dismissed charge, the statutory specifics of that charge become irrelevant. Revealing the specifics in no way impacts upon the credibility of the witness and needlessly exposes the jury to information concerning the potential sentence facing the defendant.

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari filed in this cause.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 88-1331

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RANDY ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1331

RANDY ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1.

Defendant's Sixth Amendment constitutional right of confrontation (as embodied in Fourteenth Amendment due process of law) was violated when defendant was prevented from demonstrating the extent of benefit being received by a co-defendant State witness--i.e., that the witness would receive probation and nine months incarceration, where, if he did not cooperate, he was facing a mandatory minimum prison term of six years.

Respondent, based on one question put to the witness, i.e., that the witness is not aware of a mandatory prison sentence, asserts that limitation of confrontation is appropriate. (Resp. Br. p. 6) The error of this position is that cross-examination is designed to bring forth the truth, and surely, further inquiry concerning this crucial issue should have been permitted. One cannot conclude from the Record that the witness was not aware that he could not have received probation if he did not cooperate with the authorities.

Further inquiry should have been permitted.

Such inquiry could have included questions such as:

> Question: When you were first charged, did you discuss with anyone the minimum penalty you

would have to serve if convicted?

Question: Did you know that under the charges that were dismissed, if convicted, you would be required to go to the penitentiary?

Question: Did you know, or had you been advised that if convicted on the charges that were dismissed, probation was not available?

Question: At your arraignment, were you advised that if you did not appear for trial, you could be prosecuted, and the nature and extent of the penalties that can be imposed upon you if convicted?[1]

These and similar questions could have been put to this witness, which could have exposed substantial bias of the

---

1. In Illinois, prosecution of the defendant may proceed in absentia upon non-appearance. See Ill. Rev. Stat., Chap. 38, Sec. 115-4-1.

witness, if not for the application of the "Illinois rule".

Respondent's argument that the Illinois State Court ruling is based upon the witness' assertion that he did not know that he was avoiding a mandatory minimum, is erroneous. Although the State Court set out the portion of the transcript relied upon by respondent, the Court did not rely upon such lack of knowledge, but instead set forth a rule of law based on its own prior decisions in People v. Lake, 61 Ill.App.3d 428, 378 N.E.2d 364 (1978), and People v. Gibson, 117 Ill.App.3d 270, 452 N.E.2d 1368 (1983), that in Illinois because of prejudice to the State, no inquiry concerning the possible penalty a co-defendant may be facing is permitted. In

discussing its prior decision in People v. Lake, the Appellate Court here stated:

> "We determined that the trial court's limitation of cross-examination of an accomplice was proper to prevent disclosure of the potential sentence facing the defendant." (App. 22)

Thus, the Appellate Court's holding is based on adherence to a State judicial rule of law, and not on any specific factual aspect of this particular case.

Respondent attempts to rely upon extremely distinguishable cases.

United States v. Garrett, 727 F.2d 1003 (11 Cir. 1984) (Resp. Br. p. 4), is distinguishable because there, the court permitted the jury to know of the statutory minimum sentence that the witness was avoiding by obtaining immunity, but merely limited the examination concerning the possible sentences to which he could be sentenced

under provisions that he had never been charged with. As the court said in finding examination was proper:

> "Defense lawyers were permitted to inquire into the circumstances of his arrest, the fact that he struck a deal with the government whereby he would cooperate in exchange for immunity from a crime carrying a five year minimum prison term, his status as a paid government witness, and the extent of his understandings of the various crimes with which he could have been charged." 727 F.2d at 1011. (Emphasis supplied.)

Hence, in Garrett, the court permitted the defense lawyer to do exactly what the court prohibited here: to demonstrate the statutory minimum sentence that the witness was avoiding by cooperating.

Moreover, in Garrett, the trial court limited further inquiry only after it had specifically inquired of the witness whether there had been any discussion with anyone concerning the possibility of

his being charged with the offense similar to that which the defendant faced. As the Court of Appeals stated:

> "In open court, the district judge asked Ruth '[h]as anybody with the government ever advised you of the possibility or that you could be indicted for what is known as a continuing criminal enterprise?' Ruth replied, '[n]o, sir.' As the cross-examination continued, Ruth related that he had never discussed with his attorney the types of federal crimes for which he could have been prosecuted absent the grant of immunity and that he had not been advised of the possibility of the government's securing forfeiture of his property." Ibid.

The Court of Appeals found there was no limitation because, as it said:

> "Indeed, the trial court ruled out but a single line of questioning, and did so only after ascertaining that the witness had no knowledge of the subject. Both the judge's colloquy with the witness and defense counsel's subsequent cross-examination confirm that there was no basis in fact for

the proposed line of questioning." Ibid.

That is not the situation here. Although the witness indicated that he was not aware that the cases being dismissed "got a mandatory prison sentence," there was no further inquiry by the court (outside the jury's presence), as in Garrett, sufficient to "confirm that there was no basis in fact for the proposed line of questioning."

What occurred here is that the State prevented the jury from knowing the extent of benefit being received by the witness for his testimony.

This denied petitioner his constitutional right of confrontation.

Respondent's assertion that other State Courts properly prevent such inquiry is based upon an inadequate analysis of cases.

In State v. Davis, 237 Kan. 155, 697 P.2d 1321 (Resp. Br. pp. 4-5), as distinct from here, the evidence connecting the defendant to the offense was substantial even without the testimony of the co-defendant. Within one hour after the robbery, the defendant was arrested in the vehicle that was used, he was identified by the victim, and the gun used was found in the car. While the court in Davis took the position that the defense could not demonstrate what sentence the co-defendant was avoiding, the independent evidence of defendant's guilt was so substantial that any limitation on right of confrontation would have been harmless. Here, by way of contrast, the sole evidence connecting the defendant to the offense was that of the co-defendant.

In State of Maine v. Larrabee, 377 A.2d 463, and State v. Pierce, Idaho Appellate Court, 685 P.2d 837 (Resp. Br. p. 5), the issue involved the maximum penalty, and not a statutory minimum.

There is a substantial difference between the two situations. Where a person avoids a statutory mandatory minimum term, he avoids a definite time that he would have to serve if he had not cooperated. When dealing with maximum terms, any assertion is merely speculative as to what sentence he could possibly get. Experience teaches that most offenders are not sentenced to the maximum term. Hence, while the statutory mandatory minimum is crucial for the jury to understand the benefit actually obtained by the State witness, knowing

the potential maximum term is not crucial.

Additionally, in Pierce, the decision occurred in the context of a rule of law set out in the Idaho statutes, requiring that a conviction "cannot be had on testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." No such rule of law is applicable in Illinois. Hence, where there is no evidence connecting the defendant with the offense other than that of the accomplice, a far greater reason exists than in Pierce to permit full cross-examination of the accomplice concerning the benefits that he is to receive, including evidence concerning

the mandatory minimum sentence he is avoiding by cooperating.

New York v. DeVito, 438 N.E.2d 874 (Resp. Br. p. 5), cannot be fully analyzed in that it is merely a memorandum opinion which does not assess the facts of the case, and therefore we do not discuss it.

Respondent's reliance on United States v. Del Toro Soto, 676 F.2d 13 (1 Cir. 1982) (Resp. Br. p. 6), cannot properly be based on a single sentence from the opinion. There, the jury was actually advised through the testimony of the co-defendant:

> "As far as I understand it, if I were found guilty in the four counts, I would have to be admitted to imprisonment for twenty-five years." Id. at 19.

Hence, there was no harm to defendant, because the jurors were provided the

facts from which they could assess the real benefit to the State's witness.

Respondent has not contested that the rule in Illinois is contrary to that of a majority of the other States. See Petition for Writ of Certiorari, pp. 17-20.

This is a crucial issue that needs to be resolved, and this Court should provide guidance for all the States. Uniformity amongst the States on this issue is essential to preserve the federally guaranteed constitutional right to confrontation. Certiorari therefore should be granted.

Respectfully submitted,

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